No. 77-898

In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER POMPONIO AND PAUL POMPONIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 24a-28a) is reported at 528 F. 2d 247. The opinion of the court of appeals (Pet. App. 1a-19a) on remand from this Court is reported at 563 F. 2d 659.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1977, and a petition for rehearing filed on behalf of petitioners was denied on November 22, 1977. The petition for a writ of certiorari was filed on December 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly evaluated the sufficiency of the evidence.

2. Whether the district court correctly instructed the jury with respect to its severance of the conspiracy count.

3. Whether the district court correctly refused to conduct an *in camera voir dire* examination of each prospective member of the jury with respect to pretrial publicity when petitioners cited no example of prejudicial publicity.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Peter Pomponio and Paul Pomponio, together with their attorney, Charles J. Piluso,[1] were convicted on three counts of filing false income tax returns for 1969 through 1971, in violation of 26 U.S.C. 7206(1) (Pet. App. 2a).[2] The evidence established that petitioners, together with Piluso, had collectively understated their taxable income by approximately two and one-half million dollars during the years in question

[1] Piluso's conviction was dismissed as a result of a plea bargain with the government (Pet. App. 3a, n. 3).

[2] The court of appeals' opinion, while citing the correct statutory reference (Pet. App. 2a, n. 1), erroneously stated that petitioners were convicted "of willful evasion of federal income taxes" for the three years. In fact, as the court of appeals later recognized (Pet. App. 3a), petitioners were convicted of "willfully filing false income tax returns."

(Tr. 594–603).[3] The district court sentenced petitioners to concurrent three-year terms of imprisonment, and fined them $5,000 on each count (R.A. 101–102).

The court of appeals reversed the convictions on the ground that the district court had inadequately instructed the jury on the element of willfulness (528 F. 2d 247). This Court reversed the decision of the court of appeals (429 U.S. 10). It held that the trial court had correctly instructed the jury as to willfulness, and it remanded the case to the court of appeals to consider petitioners' other assignments of error. The court of appeals then affirmed the convictions (Pet. App. 1a–19a).

Petitioners are brothers who were engaged in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia and Northern Virginia. The evidence established that petitioners had improperly treated amounts paid to them by various corporations that they owned or controlled as loans, when petitioners knew that the payments were taxable dividends; it further showed that petitioners had improperly deducted certain losses as partnership losses even though they knew that the losses had not been incurred by their partnership but by a corporation (Pet. App. 3a).

At trial, petitioners claimed that the amounts paid to them by their corporations were not dividends but

[3] "Tr." and "R.A." respectively refer to the transcript of trial proceedings and the combined appendix filed in the court of appeals.

loans that they intended to repay at some future date, and that the losses that they had deducted were properly attributable to their partnership (Tr. 976–993, 1018–1039). For a number of years, petitioners had periodically withdrawn substantial amounts of cash from their various corporations and used the funds for their personal expenses. The net advances to petitioners and Piluso for the three prosecution years amounted to more than $2.5 million. Petitioners did not dispute that they withdrew the money or that they applied it to their personal use (Tr. 200–b to 200–c, 200–e). The only question was whether the advances were loans, as petitioners claimed, or whether they took the money without intending to repay it or with the knowledge that they could not repay it. In the latter two instances, petitioners should have reported as income the amounts withdrawn from their corporations. The evidence at trial established that "although the advances were treated as loans on the books of the Pomponio corporations, * * * no date was fixed for repayment, and no notes were executed by the Pomponios as evidence of indebtedness; neither was any security given to guard against the contingency of default, nor was interest charged or paid with respect to the advances" (Pet. App. 5a–6a).

The evidence relating to the partnership losses claimed by the petitioners in their 1971 returns showed that petitioners had claimed losses that were properly those of the Virginia Corporation and not of the PHB Associates partnership. The Virginia Corporation was formed by petitioners in 1970 for the purpose of constructing a building on land to be acquired in the District of Columbia. According to petitioners, PHB Associates was formed to assume ownership of the real estate in the place of the Virginia Corporation. A nominee agreement provided that the Virginia Corporation would act as an agent for PHB, and would hold title to any real property belonging to the partnership (Pet. App. 7a.)

The prosecution's evidence further demonstrated that although a deed was executed conveying the real estate from the Virginia Corporation to PHB Associates, the corporation continued to retain record as well as actual title to the real estate (Pet. App. 7a).[4] Moreover, the corporation's bank records did not indicate any payments made by the corporation to PHB Associates, which had no bank account of its own, and the corporation itself paid all of the expenses listed on the partnership return as those of PHB (Pet. App. 8a–9a. The evidence further showed that throughout negotiations with the General Services Administration with respect to a lease of the real estate, the Virginia Corporation did not reveal that it was acting as an agent for PHB, rather than as a principal.[5] Finally, the evidence established that petitioners knew that

[4] Indeed, the corporation retained record title to the real estate as of two days before trial (Pet. App. 9a).

[5] In executing a "Proposal to Lease Space to the United States of America" (GSA Form 1364), petitioner Paul Pomponio twice listed the Virginia Corporation as the "Offeror" and also listed the corporation as the "Owner" of the real estate (Pet. App. 9a).

PHB Associates was not and could not have been validly formed in accordance with the partnership agreement. That agreement provided that all stock of the Virginia Corporation would be contributed to the capital of PHB; however, petitioners had previously pledged the corporation's stock as collateral for a debt unrelated to these proceedings, and that pledge arrangement existed until 1972 (Pet. App. 9a).

ARGUMENT

1. Petitioners contend (Pet. 10–14) that the court of appeals erroneously measured the sufficiency of the evidence by references to criteria and standards that should be used exclusively in civil determinations of tax liability. In support of their contention, they point to the court of appeals' citation of *Livernois Trust* v. *Commissioner,* 433 F. 2d 879 (C.A. 6), and *Road Materials, Inc.* v. *Commissioner,* 407 F. 2d 1121 (C.A. 4) (see Pet. 11).

But the court of appeals correctly recognized (Pet. App. 4a) "that the criminal law concerns itself only with willful violations of the tax laws, not with inadvertent errors made in good faith." Its citations to *Livernois Trust* and *Road Materials, Inc.,* do not indicate, as petitioners suggest, that the court held that evidence that would be sufficient to establish a civil tax liability would also be sufficient to sustain a criminal conviction. To the contrary, the court cited those cases for the propositions that: (1) it is the shareholder's intention to repay that distinguishes a nontaxable loan from taxable income (Pet. App. 4a); and

(2) where there is no fixed date for repayment, no interest paid, no security, and no note executed, these factors indicate that the advance is a taxable dividend, rather than a loan (Pet. App. 5a–6a). Since the corporate payments to petitioners bore none of the indicia of loans, and the Virginia Corporation held itself out as the owner of the realty, the court of appeals properly concluded (Pet. App. 5a) that "the evidence was sufficient for the jury to have found beyond a reasonable doubt that the advances were not loans" and (Pet. App. 8a) that it was "sufficient for the jury to have found beyond reasonable doubt that the Virginia Corporation's loss was improperly allocated to the PHB partnership, and that the defendants were aware of that fact when they signed their 1971 tax returns." These conclusions do not merit review by this Court.[6]

2. Petitioners further argue (Pet. 14–17) that the trial court failed to give limiting instructions with respect to its severance of the conspiracy count. However, at the time it severed the conspiracy count, the trial court did explicitly instruct the jury that the conspiracy count had been severed and that they would hear no evidence relating to it. It stated as follows (Tr. 190; emphasis supplied):

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[6] *United States* v. *Critzer,* 498 F. 2d 1160 (C.A. 4), upon which petitioners rely (Pet. 13 n.7), is irrelevant. In that case there was a legal question whether the defendant, an Indian living on a reservation, was subject to any tax on what was an undisputed set of facts. Here, if the moneys petitioners obtained from the corporations were not loans and the losses were not incurred by the partnership, there is no doubt that they filed false income tax returns.

The COURT. Members of the jury, I don't want you to get the idea that we forget you and let you sit in there. We did a lot of other things in the interim, by expediting the matters to be dis posed of during your absence.

The court heard from counsel and upon due consideration, the *court has severed some of the counts and I severed means that they are just cut apart and will be disposed of some other way by somebody, not you.*

So, *I have severed the conspiracy charge* leaving for your determination the four substantive counts, I believe there are four, is that right?

Mr. AHERN. Three, your Honor.

The CLERK. As to each.

The COURT. Three as to each. Three as to each of them for the three years, that would be nine now instead of four.

In other words, you will hear the evidence on the alleged false statement, the 1040 statement as to income taxes, and deductions, *not the conspiracy.*

All right.

You won't need to be looking for any of that evidence because it won't be forthcoming and you will not be called upon to dispose of it, and it is not your province to go into why I did it.

Neither of petitioners' counsel objected at this point to the trial court's instruction to disregard the conspiracy, nor did they request any other relief. If they believed that additional instructions were needed, this would have been the time to make such a request.

Moreover, at the conclusion of the trial, the trial judge again emphasized to the jurors that the facts were what the jury agreed upon, not what the government had suggested in its opening statement (Tr. 1091). Accordingly, the court of appeals correctly concluded (Pet. App. 19a) that the trial court gave adequate limiting instructions with respect to the severed conspiracy count.[7]

3. Finally, petitioners challenge (Pet. 17–20) the manner in which the trial court conducted the *voir dire* of the jury concerning the pretrial publicity surrounding this case. But their argument is premised on the assumption that the publicity was prejudicial—an assumption without support in the record. Despite their failure to call any example of prejudicial publicity to the attention of the trial court, petitioners nevertheless urge that the court should have examined each prospective juror individually with respect to the pretrial publicity.

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[7] Petitioners claim (Pet. 15–16) that the decision below conflicts with *United States* v. *Prieto*, 505 F. 2d 8, 12, n. 4 (C.A. 5); *United States* v. *Brown*, 540 F. 2d 364, 380 (C.A. 8); and *United State* v. *DeRosa*, 548 F. 2d 464, 471–473 (C.A. 3). Those cases do not support petitioners' claim in this case. In *Prieto*, the court held that the prosecutor's reference in his opening statement to the subsequently severed count was too brief to warrant a mistrial and that a limiting instruction would have emphasized the matter in the minds of the jury. In *Brown*, the trial judge admonished the jury to disregard the irrelevant rationale in the prosecutor's opening statement (see 540 F. 2d at 380). Likewise, in *DeRosa*, the trial court instructed the jury to disregard the portions of the prosecutor's opening statement containing assertions that were not borne out by the evidence.

In responding to this contention, the court of appeals stated (Pet. App. 12a–13a):

> The analysis we have consistently employed in cases of this nature requires the party seeking an individualized inquiry into the effect of publicity to bring specific examples of allegedly prejudicial publicity to the attention of the trial court. Only then can the court determine if the publicity is of a sufficiently prejudicial nature to mandate individual questioning of jurors or veniremen. *United States* v. *Jones,* 542 F. 2d 186 (4th Cir. 1976). General allegations of damaging publicity are sufficiently dealt with by questions and admonitions addressed to the panel as a whole. 542 F. 2d at 195, n. 11; see *United States* v. *Thomas,* 463 F. 2d 1061 (7th Cir. 1972); *Margoles* v. *United States,* 407 F. 2d 727 (7th Cir.), cert. den. 396 U.S. 833 (1969).
>
> We agree with the government that, because the defendants here failed to bring specific items of allegedly damaging publicity to the court's attention to enable it to determine independently whether individual questioning was either necessary or desirable, the court had no obligation to conduct such questioning. The defendants simply dumped the multitude of articles on the court, about 110 at one time and 28 [footnote omitted] at another, apparently hoping to make an impression on the basis of quantity alone, see *United States* v. *Jones, supra; United States* v. *Hankish, supra,* [502 F. 2d 71 (C.A. 4)] and inviting error when they asked the trial court to wade through the voluminous items of publicity without even the benefit of counsel's help in pinpointing objectionable matter.

Petitioners have never explained why they could not have brought any prejudicial news article to the attention of the trial court. Rather, they simply assert (Pet. 18) that the court of appeals has created "a standard which would be impossible to meet." But the standard applied by the court of appeals is no different from that of the other circuits. See, *e.g., United States* v. *Liddy,* 509 F. 2d 428, 434–437 (C.A.D.C.); *United States* v. *Hall,* 536 F. 2d 313, 324–326 (C.A. 10); *United States* v. *Polizzi,* 500 F. 2d 856, 880 (C.A. 9); *Margoles* v. *United States,* 407 F. 2d 727, 732 (C.A. 7), certiorari denied, 396 U.S. 833. See also *Beck* v. *Washington,* 369 U.S. 541, 556–557; *Murphy* v. *Florida,* 421 U.S. 794, 800–801, n. 4.

Petitioners also assert (Pet. 19–20) that there is a conflict among the circuits as to whether general admonitions to the jury with respect to pretrial publicity are sufficient. But the cases they cite (Pet. 20, n. 13) are not in conflict with the standard applied by the court of appeals. Those cases, like the decision below, all require some initial showing that the jury was likely to have been exposed to pretrial publicity that was prejudicial to the defendants. *United States* v. *Liddy, supra,* 509 F. 2d at 435; *Margoles* v. *United States, supra,* 407 F. 2d at 735; *United States* v. *Bryant,* 471 F. 2d 1040, 1044–1045 (C.A.D.C.), certiorari denied, 409 U.S. 1112; *Patriarca* v. *United*

States, 402 F. 2d 314, 318 (C.A. 1), certiorari denied, 393 U.S. 1022.[8]

At all events, the court of appeals correctly pointed out (Pet. App. 13a–14a) that petitioners had not challenged, individually or collectively, any of the jurors who had indicated that they had read something about the case. Indeed, at the bench conference prior to the conclusion of the *voir dire,* at which the trial court considered suggestions for further questions to be addressed to the panel, petitioners did not suggest any additional questions to be directed to those veniremen who had indicated exposure to pretrial publicity (R.A. 188–189). If petitioners deemed further questions essential, they should have requested the trial court to make specific additional inquiries. Since petitioners failed to suggest additional questions to challenge any of the jurors who had indicated an exposure to the pretrial publicity, or to bring to the trial court's attention any specific instances of prejudicial publicity, they cannot now be heard to complain that they were in fact prejudiced by the manner in which the *voir dire* was conducted.[9]

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[8] *Silverthorne* v. *United States*, 400 F. 2d 627 (C.A. 9), certiorari denied, 400 U.S. 1022, upon which petitioners rely (Pet. 18, 20), also does not support their claim. There, the court did not specify when individualized examination of jurors was necessary. Rather, the court held only that the individualized examination conducted in that case was inadequate.

[9] Petitioners contend (Pet. 17–18) that the court of appeals "ignored" the directive of *Sheppard* v. *Maxwell*, 384 U.S. 333. But the court of appeals took care to point out that the publicity in this case bore little resemblance to that in *Sheppard* (see Pet. App. 10a–11a, n. 9, 13a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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